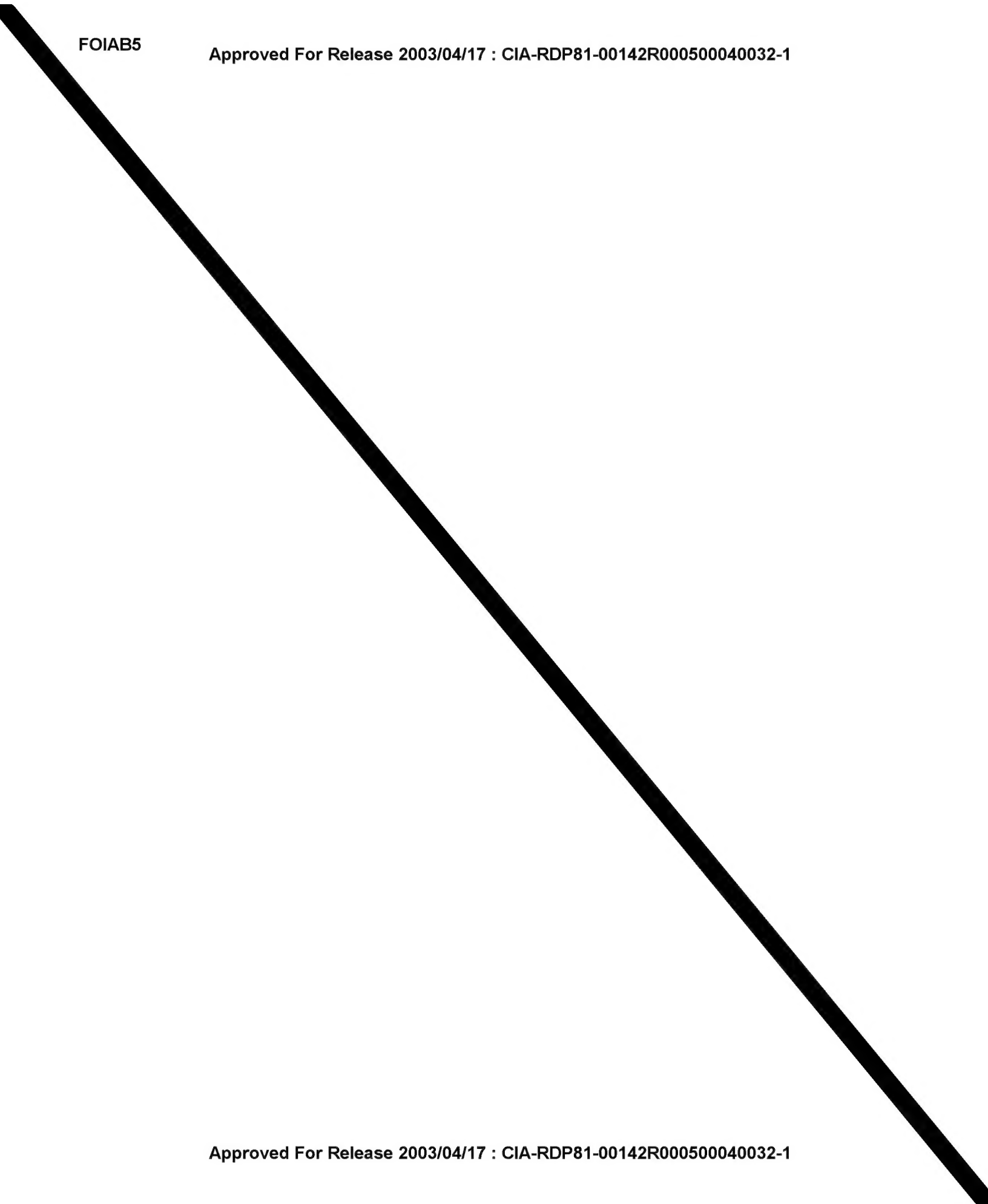
8 June 1978



Approved For Release 2003/04/17 : CIA-RDP81-00142R000500040032-1

25 May 1978

MEMORANDUM OF LAW

FROM [redacted]
Assistant General Counsel

STATINTL

SUBJECT : Age Discrimination

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[redacted]

2. Subsection 4(a) of the 1967 Act (29 U.S.C. §623(a)) provides, in pertinent part, that "[i]t shall be unlawful for an employer...to discharge any individual...because of such individual's age...." Subsection (f) of that same section (29 U.S.C. §623(f)) provides, however, that:

> [i]t shall not be unlawful for an employer...to observe the terms of...any bona fide employee benefit plan such as a retirement...plan, which is not a subterfuge to evade the purposes of this chapter...and no such...employee benefit plan shall require or permit the involuntary retirement of any individual specified by Section 12(a) of this Act [those individuals between 40 and 70 years of age] because of the age of such individual.

The portion beginning "and no such...employee" to "age of such individual" was added by recent amendment, Pub. L. 95-256, in part because of the congressional rejection of the Supreme Court's decision in United Air Lines, Inc. v. McMann, 54 L. Ed. 2d 402 (1977).

3. In 1974 the 1967 Act was also amended by adding a section dealing with Federal employment. Pub. L. 93-259. Subsection 633a(a) of Title 29 states in pertinent part, that: "[a]ll personnel actions effecting employees ...in executive agencies as defined in section 105 of Title 5...shall be made free from any discrimination based on age." The Agency falls within the definition of 5 U.S.C. §105 because that definition includes independent establishments which by definition (5 U.S.C. §104) the Agency falls within.

4. Several questions about the scope of the original Act and the subsequent amendments can be raised which are important to the Agency. For example, how does Subsection (f) of §623, as now amended, qualify the absolute prohibition against age discrimination in Subsection 623(a)? What effect did the adoption of Section 633a have on the applicability of §623 as to Federal Government practices? FOIAB5 FOIAB5

5. The Age Discrimination in Employment Act has been the subject of a great deal of litigation in the Federal courts. Predictably there have been differences in interpretation among several of the circuit courts of appeal. Until the recent enactment of Pub. L. 95-256 (the Age Discrimination in Employment Act Amendments of 1978) it was thought that several of these fundamental differences were resolved by a recent decision of the Supreme Court. In order to put the new legislation in perspective, it is useful to first examine that decision.

6. The recently decided (12 December 1977) case of United Air Lines, Inc. v. McMann, probably would have become a landmark case in this area of the law if it were not for the even more recent legislation. In that case, the court, by a 7-2 majority, resolved fundamental differences of interpretation of the Act between the Fourth and Fifth Circuits and it answered several fundamental questions about the scope of the Act.

7. The case involved a United Air Lines employee who had been forced by United to retire immediately following his 60th birthday pursuant to provisions of its retirement plan which the employee had voluntarily joined. The plan had been established in 1941 by United. The employee, McMann, joined United in 1944 when he was 31 years old but did not elect to participate in the plan until 1964, twenty years later. At the time of his initial employment he was eligible, but not compelled to participate in the plan. Under the plan the normal retirement age for its participants in his category of employment was 60 years. In 1973, when McMann reached 60 he was retired by United over his objection. In oral argument before the Court of Appeals counsel agreed that United could legally "retain employees such as McMann past age 60, but has never done so." That court found that for the purposes of its decision "the plan should be regarded as one requiring retirement at age 60 rather than one permitting it at the option of the employee" McMann v. United Air Lines, Inc., 542 F. 2d 217, at 219 (4th Cir., 1976). The Supreme Court noted this conclusion without taking exception to it.

8. In its decision below, the Court of Appeals had held "that a pre-age 65 retirement falls within the meaning of 'subterfuge' [within §623] unless the employer can show that the 'early retirement provision...has some economic or business purpose other than arbitrary age discrimination.'" 54 L. Ed. 2d, at 408. The Supreme Court, however, reversed this holding. In its decision

the court found that "[t]he Act covers individuals between 40 and 65 but does not prohibit all enforced retirements prior to age 65." 54 L. Ed. 2d, at 408.

9. In its decision the court reviewed the differences between the Fourth and Fifth Circuits. The court recognized that Brennan v. Taft Broadcasting, 500 F. 2d 212 (4th Cir., 1974) held that establishment of a bona fide retirement plan long before enactment of the Act, 'eliminat[ed] any notion that it was adopted as a subterfuge for evasion.'" 54 L. Ed. 2d, at 410. Incidentally, in McMann the court noted that McMann had received the opinion of the Department of Labor that "United's plan was bona fide and did not appear to be a subterfuge." 54 L. Ed. 2d, at 401. The Court, however, did not adopt the "per se" standard of Taft Broadcasting, although the concurring opinion by Justice Stewart seems to urge that view. That standard would dictate that any plan adopted prior to the Act would have to be valid because no employer could have known with absolute certainly that Congress was going to pass the Act. Justice White in another concurring opinion specifically rejected this view.

10. In McMann the Court went to some length to say what the Act did not mean to do. In addition to that mentioned above, it rejected the Fourth Circuit's standard that an employer had to show an economic or business purpose in order to satisfy the Act's subterfuge language. 54 L. Ed. 2d, at 413. It stated that the Act will not be interpreted as undermining the huge number of bona fide plans that existed at the time of passage of the Act unless there is clear, unambiguous expression to the contrary in the Act. 54 L. Ed. 2d, at 410. Apparently there was not such an expression, at least with respect to the plan at issue. The Court did not however state a clear positive standard for future use in these types of cases. And McMann left open the question as to a situation where the employer elects to retire some employees at some specific age prior to age 65 (the maximum age to which the Act then applied). As to the private sector, it now applies to age 70 with certain exceptions.

11. The Court in McMann also rejected a distinction made by both the Fourth and Third Circuits between the Act and its purposes. It noted Zinger v. Blanchette, 549 F. 2d 901 (3rd Cir., 1977) cert. denied 46 U.S.L.W. 3436 in which the court there accepted the Fourth Circuit's distinction in this regard as expressed in McMann below. However, the Third Circuit in Zinger, contrary to the Fourth in McMann, found the retirement plan at issue not in violation to the Act.

12. Part of the purpose of Pub. L. 95-256 is to modify the statutory language upon which the Court in McMann relied. The congressional

> conferees specifically disagree with the Supreme Court's holdings and reasoning in that case [McMann]. [Retirement p]lan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2)[29 U.S.C. 623(f)(2)] by virtue of the fact that they antedate the act or these

amendments. H.R. Report No. 95-950, 95th Cong., 2d Sess. 8 (1978) [hereinafter cited as H.R. Report No. 95-950].

Thus, this 1978 amendment removes the previously available defense that an involuntary retirement pursuant to a bona fide plan excuses even proven age discrimination. While the Agency clearly loses a potential defense in age discrimination litigation because of this amendment, because of another amendment to the Act in the same legislation that defense is lost for other reasons also.

13. Regarding the subject of age discrimination, a longstanding issue with Federal employers is what effect, if any, Section 633a has on Section 623 and the interpretations thereof as outlined above. The U.S. District Court for the District of Columbia in Bradley v. Kissenger, 418 F. Supp. 64 (D.D.C., 1976) examined this issue. There the court found that Section 623(f) which provides the exception for retirement pursuant to a bona fide retirement plan "is clearly incorporated in the 1974 amendment [Section 633a related to Federal employment] and thus applicable to the Federal Government." 418 F. Supp., at 69. Thus, at least with respect to this court and prior to Pub. L. 95-259, the case law relative to §623(f) was applicable to the Federal situation. In a case involving a 46 year Federal employee who was suing to be retired at that age--which was denied--the Fifth Circuit also found that the Section 623(f) exception applies to the Federal Government. Mason v. Lister, 562 F. 2d 343 (5th Cir., 1977). In an apparently unreported case, Christie v. Marston, No. 76-1780 (7th Cir. decided 4 March 1977), the Seventh Circuit has held that Section 633a is complete in itself and not subject to other provisions and limitations of the Act. H.R. Report 95-527, Part 1, 95th Cong., 1st Sess. 5 (1977) [hereinafter cited as H.R. Rept. 95-527].

14. Section 5 of Pub. L. 95-256 attempts to resolve this conflict. That legislation amends Section 633a by adding a new paragraph thereto which states that:

> [a]ny personnel action of any department, agency...shall not be subject to, or affected by, any provision of this Act, other than the provisions of Section 12(b) of this Act [which states that the individual must be at least 40 years old before he is protected by the Act] and the provisions of this section [633a]. (Emphasis added)

The purpose of this amendment was to make it clear that for Federal employment purposes Section 633a is independent of any other section of the Act, except of course Section 12(b). H.R. Report 95-950, supra at 11. The House Report on the bill (H.R. 5383, 95th Cong.) which contained this amendment (which was

agreed to by the Senate conferees after amendment) states that the amended Section 633a is to prohibit employment discrimination on account of age in Federal Government employment and that section is complete in itself. Restrictions and limitations in other parts of the Act, such as paragraph (f) of Section 623 do not apply to Section 633a. Thus, the Agency, as well as all Federal employees lose the defense based on the exception of §623(f) for a second reason. The report continues to say, however that, "these amendments [to Section 633a] do not in any way disallow Federal employees from being discharged or terminated for cause or from being hired, retained or terminated based on a bona fide occupational qualification." H.R. Report 95-527, supra at 11. This report also states that:

> This legislation would not forbid or restrict reasonable attempts to maintain high mental and physical standards through practices such as more frequent physical examinations for older employees.
>
> This legislation does not require employers to provide special working conditions for older workers to allow them to remain or become employed. While special jobs, part-time employment, retraining and transfers to less physical demanding jobs may be of great benefit to the older employees and the employer alike, these activities are not required by this legislation. H. R. Report 95-527, supra at 12.

15. More importantly the conference reports states that:

> The House bill amends section 12 of the act [which sets the age limits for the Act's applicability] by eliminating the upper age limitation for most civilian Federal employees, but does not affect certain Federal employees whose retirement is required or otherwise authorized by statute. [Emphasis added.] H.R. Rept. 95-950, supra at 10.

The report does not detail which such employees are not to be affected. However, action on the House floor provides some insight into that matter. During the House debate on H.R. 5383, Congresswoman Spellman introduced an amendment to that bill. That amendment was adopted and became Section 5 of Pub. L. 95-256. That is the section which deals with the Federal employment issues of this subject matter. In offering her amendment Congresswoman Spellman explained that, among other purposes, it

> will leave intact the existing retirement provisions applicable to Foreign Service personnal (sic) and employees of the Central Intelligence Agency. 123 Cong. Rec. H 9969 (daily ed. 23 Sept. 1977).

Passage of the bill with this amendment without challenge is a strong indication FOIAB5
that the other members agreed with Congresswoman Spellman's purposes.

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In Massachusetts Bd. of Retirement v. Murgia, 49 L. Ed. 2d 520 (1976) the court examined the issue of whether mandatory retirement of a State uniformed police officer, Murgia, at age 50, pursuant to a state statute, violated the equal protection guarantees of the Fourteenth Amendment. A Three-Judge District Court had held that it did. 376 F. Supp. 753 (D. Mass., 1974). The Supreme Court reversed.

17. The court noted in Murgia that there was no dispute as to the actual health of Murgia. It was excellent with respect to both his mental and physical capacities. He was capable of performing these duties of a uniformed officer.

18. In reversing the District Court the Supreme Court

> reaffirmed that [an] equal protection analysis requires strict scrutiny of a legislative classification [here that all uniformed state police officers must retire at age 50] only when the classification impermissibly interfers with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class [footnotes omitted] 49 L. Ed. 2d, at 524.

It found that the particular statute in question involved neither situation. This was so because there is no fundamental right to governmental employment. 49 L. Ed. 2d, at 524. The court added that "[e]ven if the statute could be said to impose a penalty upon a class defined as the aged, it would not impose a distinction sufficiently akin to those classifications that we have found suspect to call for judicial scrutiny." 49 L. Ed. 2d, at 525. Noting that physical ability generally declines with age, the court found that the mandatory requirement statute rationally related to the State's objective--that of protecting the public by assuming the physical preparedness of its uniformed police. The court did not have to deal with the situation in which the retirement at a particular age was not mandatory but only at the option of the employer. Several lower courts, however, have dealt with that issue. With Pub. L. 95-256's denial of the 623(f) defense to the Federal employer, the importance of those cases to the Federal employer is greatly reduced. Nonetheless, they are briefly outlined here for reference purposes.

19. In Zinger the court upheld a retirement plan--that is did not find it violated the Age Discrimination in Employment Act--that provided that "[t]he company may elect to retire any such person between ages 60 and 65...." 549 F. 2d, at 902. In McKinley v. Bendix Corp., 420 F. Supp. 1001 (W.D. Mo., 1976), the court also upheld a pension plan which provided for involuntary retirement of the corporation's employees after age 55 at the option of the corporation. 420 F. Supp., at 1001. In this case the court noted that in examining this type of plan the fact that the employee's job performance was exemplary is irrelevant. 420 F. Supp., at 1001. Similarly, in Dunlop v. Hawaiian Telephone Co., 415 F. Supp. 330 (D. Haw., 1976) the court upheld a plan wherein the employee could retire voluntarily at age 60 and the company could involuntarily retire him at the same age. 415 F. Supp., at 331. This court went to some length to criticize the Fifth Circuit's opinion in Taft Broadcasting. It found that the issue of whether a retirement plan was a "subterfuge to evade" should be decided by examining whether the retirement benefits provided by the plan are sufficient. Only if they are not sufficient should a plan be held to be a subterfuge. 415 F. Supp., at 332.

20. While the court in Bradley v. Kissinger found that the statutory retirement provisions of the Foreign Service Act (FSA) did not violate the Age Discrimination in Employment Act,--a decision which might not change but would not be made for the same reasons because of the change by Pub. L. 95-256 of the basis for that view (the decision was based on the exception of §623(f) to the Act)--in a later review, the court found that those retirement provisions were unconstitutional. In Bradley v. Vance, 436 F. Supp. 134 (D.D.C., 1977) a three judge court held that the statutorily required retirement at age 60 violated the equal protection guarantees of the Fifth Amendment. They held that the early retirement age for Foreign Service personnel was not supported by rational basis and, thus, participants could not be subject to automatic retirement age until the mandatory retirement age for Civil Service employees which was then at age 70 years. 436 F. Supp. 138. Several observations are important to this case. First, the mandatory retirement at age 70 for Civil Service employees, which was in being when this case was decided, has been repealed. This repeal is to be effective 30 September 1978. Pub. L. 95-256. This case seems to require the application of the mandatory Civil Service retirement age to the FSA. But there is now no such age, yet from the House floor action outlined above Pub. L. 95-256 was to have no effect on the FSA. This presents an interesting conflict.

21. Second, of particular interest is the court's statement in Bradley v. Vance that:

> The Government presents two explanations for the retirement age distinction. It first says that the mandatory retirement age is rationally related to its interest in creating advancement opportunities

for younger people. However, an interest in recruiting and promoting younger people solely because of their youth is inherently discriminatory and cannot provide a legitimate basis for the statutory scheme. Furthermore, there is no obvious reason why such a rationale would not equally apply to the Civil Service, and defendants have presented none. 436 F. Supp., at 136.

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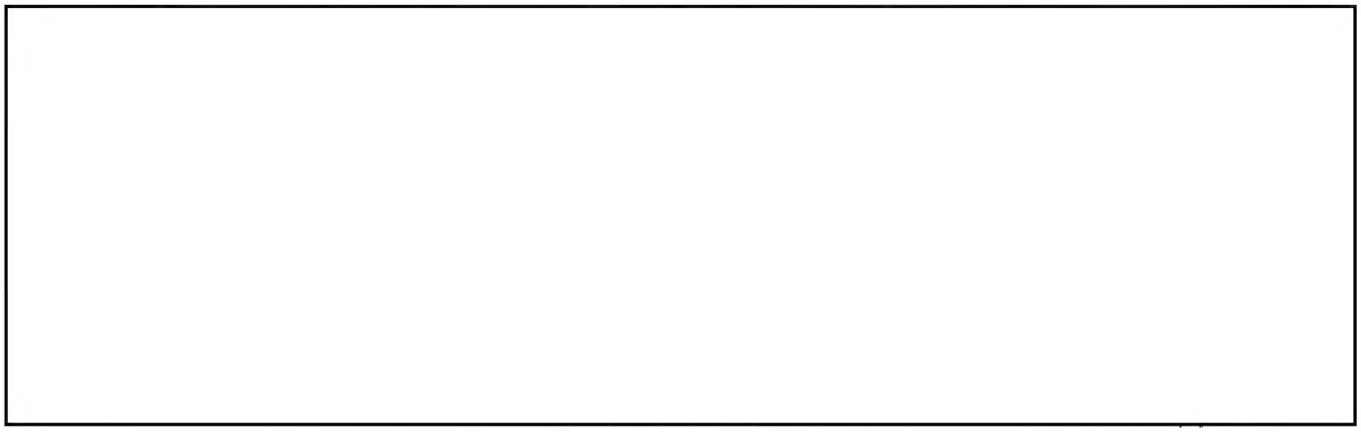

23. One Eighth Circuit case is also worth noting here. First it should be mentioned that this case was decided prior to the Supreme Court decision of McMann. Notwithstanding, it may have some applicability to some situations in which the Agency might find itself. Houghton v. McDonnell Douglas Corp., 553 F. 2d 561 (8th Cir., 1977) involved the involuntary termination of a test pilot, Houghton, of the corporation. Apparently there was no retirement plan for which he could qualify as he was only 52 years old. The corporation found itself in a situation in which it was necessary to reduce the pilot staff because of a declining airplane production rate. It decided to make the reduction based on age; the oldest test pilots were transferred from flight status to other jobs. Houghton tried several other jobs but found them unsatisfactory. He was finally terminated for unproductivity. The corporation admitted that he was removed from flight status solely because of age. The court upon reviewing Houghton's excellent health record and data indicating that older pilots are less accident prone than younger ones found that the corporation's action violated the Act. The court concluded that:

> The motivating cause of his discharge was his insistence upon his statutory rights under the Act. This in itself is an illegal motivating factor on the part of the company. Brennan v. Maxey's Yamaha, Inc., 513 F. 2d 179, 181 (8th Cir. 1975). His illegal transfer from flight status, in the face of his insistence upon his statutory rights, was the root of his severance. He is thus entitled to relief. 553 F. 2d, at 364.

It is important to remember that in this case the corporation apparently did not have the defense under the exception of the Act for retirement pursuant to a

bona fide retirement plan. It, of course, is relevant to the Federal employer because of Pub. L. 95-256's removal of that exception as a defense.

24. That situation was also apparently the case in Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va., 1977). Those several employees of NCR were discharged. The company affirmed that they "were good employees right up to the day they were discharged" 433 F. Supp., at 658 but they were discharged because they were not trained to repair newly developed NCR equipment even though NCR had provided this type of training to their younger repairmen. The court examined the Act's standard by which employment decisions are to be judged. It said that:

> The first court to define this standard was in Bishop v. Jelleff Associates, 398 F. Supp. 579 (D.D.C. 1974). The court stated that:
>
> > [t]he statute is not violated in the case of termination or other employer decisions which are premised upon a rational business decision made in good faith and not actuated by age bias.

Then went on to note that:

> The court in Laugesen v. Anaconda Co., 510 F. 2d 307 (6th Cir. 1975) adopted a 'determining factor' test and explained how the jury should judge the legality of the employment decision:
>
> > [w]e believe that it was essential for the jury to understand from the instructions that there could be more than one factor in the decision to discharge him and that he was nevertheless entitled to recover if one such factor was his age and if in fact it made a difference in determining whether he was retained or discharged. This is so even though the need to reduce the employee force generally was also a strong, and perhaps even more compelling reason.

The court then concluded that:

> [W]hile the company can discharge its employees, it cannot base the decision about which employee to discharge on age or on factors created by age discrimination.
>
> NCR's decision to discharge plaintiff was not directly based on age, but it was based on the training of plaintiffs. The evidence clearly established that the relative training levels of NCR employees was directly related to the age of the employees. So by using the

training level as the basis of the discharge decision, NCR indirectly discharged plaintiffs because of their age. Therefore this court holds that the training or lack of training, which ostensibly is an objective and valid criterion for employment decisions, cannot form the basis of an employment decision when that lack of training is created by age discrimination. The age discrimination which invalidates an employment decision need not be direct or intentional. This court further holds that both plaintiffs were discharged 'because of' their 'age.' 433 F. Supp., at 661.

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25. Two other points are relevant to this subject. One alleging age discrimination is entitled to a jury trial. Lorillard v. Pons, L. Ed. 2d 40 (1978). Pub. L. 95-256 has amended the Act to specifically reflect this view. H.R. Rept. 95-950, supra, at 18. It seems well settled by the courts that if one alleging age discrimination prevails he is entitled to recover his attorney fees. Rogers v. Exxon, Rodriquez v. Taylor, 569 F. 2d 1231 (10 Cir., 1977) cert. granted 46 U.S.L.W. 3698, Brennan v. Ace Hardware Corp., 495 F. 2d 368 (8th Cir., 1974), Schulz v. Hickok Mfg. Co., Inc., 358 F. Supp. 1200 (D. Ga., 1973), Monroe v. Penn-Dixie Cement Corp, 335 F. Supp. 231 (D. Ga., 1971), Combes v. Griffin Television, Inc., 421 F. Supp. 841 (D. Okla., 1976), cf Coates v. National Cash Register Co., (D. Ohio, 1974).

[redacted]

STATINTL

☐ UNCLASSIFIED ☐ INTERNAL ONLY ☐ CONFIDENTIAL ☐ SECRET

ROUTING AND RECORD SHEET

SUBJECT: (Optional)

DD/A Registry
File Personnel-11

FROM:	EXTENSION	NO.
Anthony A. Lapham General Counsel Rm. 7D01, Hqs.		

STAT

DATE: 8 June 1978

TO: (Officer designation, room number, and building)	DATE RECEIVED	DATE FORWARDED	OFFICER'S INITIALS	COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)
1. Jack Blake, DDA Rm. 7D18, Hqs.	9 JUN 1978			I attach for your information a memorandum of law concerning age discrimination as relevant to CIA by [redacted] together with a two-page summary of that paper.
2.				
3. Omega Ware, D/EEO Rm. 5E46, Hqs.				
4.				
5. D/Personnel 5E58 Hqs				
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[redacted]

Anthony A. Lapham

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DD/A Registry
78-2335

Chrono, Subject

FORM 610 USE PREVIOUS EDITIONS ☐ SECRET ☐ CONFIDENTIAL ☐ INTERNAL USE ONLY ☐ UNCLASSIFIED